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Comment on Recent Cases

Advancements: Recital in Subsequently Executed Will: Effect of Residuary Clause under Sections 1331-1333 Civil Code.

The Supreme Court of California by its decision In re Hayne[1] has established for this jurisdiction the following propositions with respect to the law of advancements:

1. The doctrine of advancements applies to cases where the decedent dies intestate as to a part only of his property if the will indicates an intention that the testator intends the doctrine to apply.

2. The general requirement that the advancement must be evidenced by a writing contemporaneous with the act of making it does not prevent a declaration in a subsequently executed and duly probated will from being competent evidence of the fact.

[1] (June 5, 1913) 45 Cal. Dec. 693, 133 Pac. 277.

Of course, the doctrine of advancements can have no application in cases where the testator's entire estate is disposed of by the will, for the reason that the testator must be deemed to have taken into consideration the entire situation of his family arrangements in making the will, and to have intended the legacies given by him to take effect precisely as expressed by him. For the same reason even though there be a partial intestacy, the doctrine of advancements does not in general apply.[2] If provision has been made for a child by the will, it is clear that the testator intended both the advancement and the testamentary provision to insure to the child's benefit; if no provision has been made by the will, the testator, in effect, ratifies the previous provision by way of advancement. But while the general principle was clearly established by the common law that a child need not bring its advancements into hotchpot in cases of partial intestacy, the exception recognized in the principal case is also supported both by reason and by authority,—namely, that where the testator indicates an intention that advancements shall be deducted, such intention should have effect. In the principal case, the testatrix plainly evinced this intention. She said, in substance, "I have already advanced to my son William, more than what would be his share of my estate, and therefore I leave him nothing." The result would have been the same had she said, "I desire the advancements which I have made to him to be reckoned against my son William's share," and left it to the court to find out what the advancements were.

The second proposition laid down by the opinion rests upon the principle that the testator's declarations as to the condition of his estate, are binding upon those who assert any claim by virtue of the will. If he says, "I give A one fourth of my estate after deducting an advancement of $10,000, which I have made to him," it becomes immaterial to find out whether an advancement has actually been made or not. The testator's declaration is conclusive. It is sometimes said that the testator may, if he pleases, by his will turn a loan into an advancement or a gift into an advancement.[3] But the truth is that, in such case, the court in construing the will is not obliged to travel outside of the instrument itself. The legatee claims through the will and must abide by the language of the instrument. It might be better, perhaps, to reject the word "advancement" in dealing with such problems of interpretation, though the word is harmless, if we remember that we are not using it in a strict or primary sense.

The application of the second proposition, as above set forth, to the case in hand is fraught with some difficulty, but there would seem to be no reason to doubt that the court correctly solved the problem presented by the facts. The testatrix had five sons when she executed her will, Benjamin, Brewton, Stephen, Arthur and William,

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[2] 2 Woerner, Am. Law of Administration, (2d ed) sec. 553.

[3] Darne's Executors v. Lloyd, (1887) 82 Va. 859, 5 S. E. 87.

and a grandson, the child of a deceased son, Robert. She gave the bulk of her estate by the residuary clause of her will to the four first named, and left nothing to William, because she had advanced to him, (so she declared), more than his share would amount to. Later, Arthur, one of the residuary legatees, died without issue, and the testatrix some time after Arthur's death made a codicil, the main provisions of which were to give Benjamin his share absolutely instead of through a trustee, as in the original will. The codicil in all other respects ratified the original will. The situation, taking the will and codicil together, thus presented was the case of a residuary devise to four persons by name, one of whom was dead at the time of the bequest, and, as the evidence showed, then known to the testatrix to be dead. Assuming that Arthur's share lapsed or failed, and that it would go to the next of kin, William was still confronted by the provision, reiterated and reaffirmed by the codicil, that he had already received more than his share, and should, therefore, not take any part of the testatrix's estate. The testatrix, knowing that Arthur was dead, when she made the codicil, must be held to know her partial intestacy. When, therefore, she repeats her statement that William has already received more than his share, she must have meant that he has received more than one-fifth, what he would have been entitled to at that time,—not merely more than the one sixth portion to which he would have been entitled when the original will was made and Arthur was still alive.

The fact should not be overlooked that William was not claiming under the will, and it is for this reason that we have said there seems to be some difficulty in applying the second proposition. An heir at common law could not be disinherited unless by a devise to some one else, and merely saying that I leave nothing to A, because I have made him advancements, cannot have the effect of disinheriting A, if he be alive, unless there be an affirmative disposition of the property. In the case of of a total intestacy, (as, for example, where the entire estate is given on illegal trusts), it is believed that the clause would have no application,—the instrument having no other dispositive clauses would cease to be a will. The Court therefore, in the principal case, carefully limits the doctrine to duly probated wills. But where, as in the case under comment, the intestacy is but partial, it does not seem improper to say, as the Court does, that the clause containing the declaration "becomes a part of the testamentary disposition of the estate." The heir, who must resort to the will to establish the fact of the partial intestacy, should be bound by the recitals of the instrument. Indeed, in the case of language of disinheritance so strong as that in the present will, respectable authority (though, it must be confessed not the authority in this jurisdiction) may be cited to support the view that the disinheritance of one of the next of kin is a devise by implication to the remaining next of

kin.[4] In whatever technical form the result be expressed, it must be conceded that the court's decision carries out to the full extent the testatrix's intention.

The case is as interesting for the points left undecided as for those settled by it. It was not necessary for the court to consider the other questions discussed by counsel, and it very properly abstained from uttering dicta. But the ingenious and learned discussion by counsel of the meaning of section 1332 and 1333 of the Civil Code defining the scope and effect of the residuary clause in a will, though not mentioned in the opinion, deserve comment in this Review. The appellant's counsel contended, with great force, that these sections give to the residuary clause of a will a much wider scope that it had under the early English statutes or even under the English Statute of Wills of Victoria,—that the rules of the English law favoring the heir and the next of kin should have no application under our system, and that so long as a single residuary legatee remains, he will take all lapsed and ineffectual legacies. The language of the statute certainly seems to be as universal as possible. All property, these statutes say, not otherwise devised by the will, passes under the residuary clause. Notwithstanding this language, however, the court has recognized the English doctrine that where one of the residuary legatees dies before the testator and after the date of the will, there is an intestacy as to his share, unless he may be construed to be a member of a class. Section 1343 of the Civil Code would seem to require this result, for it provides that where a devisee or legatee dies before the testator, the provision as to him fails, (except he be a relative and dies leaving descendants), unless an intention appears to substitute some other in his place. In the case provided for by this section, the disposition fails unless an intention appear to make a substitution. But in cases not covered by section 1343, where, for example, one of the residuary devisees cannot take under the mortmain acts or, where, as in the present case, one of the residuary devisees is non-existent, the language of sections 1331 to 1333, if literally followed, prevents a partial intestacy. The rule laid down in those sections seems to be a statutory rule, not dependent upon actual intention, as in the case under somewhat similar statutes,—for example, under the English Statute of Wills, which provides that "unless the contrary intention shall appear by the will, it shall be construed as if executed immediately prior to the testator's death.

The decision in the recent case of In re Kunkler[5] is inconsistent

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[4] Page on Wills, p. 549; Tabor v. McIntire, (1881) 79 Ky. 505, 506-7. But see In re Walkerley, (1895) 108 Cal. 628, 652, 41 Pac. 772; Estate of Pichoir, (1903) 139 Cal. 682, 686, 73 Pac. 606. See also, note in 25 Ann. Cas., 1148-50.

[5] (1912) 163 Cal 797, 127 Pac. 43.

with this view, but the point was not discussed in the opinion of the Court in that case nor does it seem to have been urged in the printed briefs of counsel. It is possible, therefore, if not probable, that the interpretation of these sections has been substantially settled against the appellant's contention.

O. K. M.

Appeal and Error: Reversal for Admission of Incompetent Testimony.—In the Estate of de Laveaga,[1] one of the contestant's witnesses wrote a letter promising to testify as to the incompetency of the deceased. The deposition of the witness, however, was so evasive and disappointing, that the lower court admitted in evidence the letter to impeach the witness on the ground of surprise. The witness had failed to testify in favor of the contestant; but did not testify against him. The admission of the letter was error, for the California rule requires both surprise and damage to appear, before a party may impeach his own witness by inconsistent statements.[2] The Supreme Court, however, held that despite the admission of this incompetent evidence, the truth appeared to have been reached, and refused to reverse the judgment.

Is this decision to be taken as an adoption of a new principle? Does it definitely commit the court to the rule that error in the admission of incompetent evidence is not sufficient ground for setting aside the verdict and the ordering of a new trial, unless upon all the evidence, it is clear that the truth has not been reached? Past decisions have been inconsistent. The language of the court, however, has often been such as to indicate a tendency toward a contrary rule. In Roff v. Duane,[3] it said, "We cannot say that because the remaining evidence was sufficient to authorize the court to find for the plaintiff, therefore, the error[4] became immaterial, for it is impossible to ascertain whether the court found for the plaintiff from the lease or from other testimony in the case." In Smith v. Westerfield,[5] "We cannot agree that inasmuch as other witnesses testified to the same fact, this was immaterial error. We cannot determine the weight the court below gave to this witness in reaching its conclusion." This view was reiterated in Lissak v. Crocker Estate Co.,[6] "A party cannot after insisting upon the admission of improper evidence over objec-

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[1] Estate of de Laveaga, (June 14, 1913) 46 Cal. Dec. 1.

[2] People v. Jacobs, (1874) 49 Cal. 385; People v. De Witt, (1886) 68 Cal. 584, 10 Pac. 212; People v. Mitchell, (1892) 94 Cal. 550, 29 Pac. 1106; People v. Kruger, (1893) 100 Cal. 523, 35 Pac. 88; Zipperlen v. Southern Pacific Co., (1907) 7 Cal. App. 205, 215, 93 Pac. 1049.

[3] Roff v. Duane, (1865) 27 Cal. 565.

[4] The error was the admission of a lease which was incompetent evidence. Immaterial and incompetent evidence are clearly distinguished in the cases.

[5] Smith v. Westerfield, (1891) 88 Cal. 374, 26 Pac. 206.

[6] Lissak v. Crocker Estate Co. (1897) 119 Cal. 445, 51 Pac. 688.